

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

TRANSCRIPT OF RECORD.

Court of Appeals, District of Columbia

OCTOBER TERM, 1909.

No. 2079.

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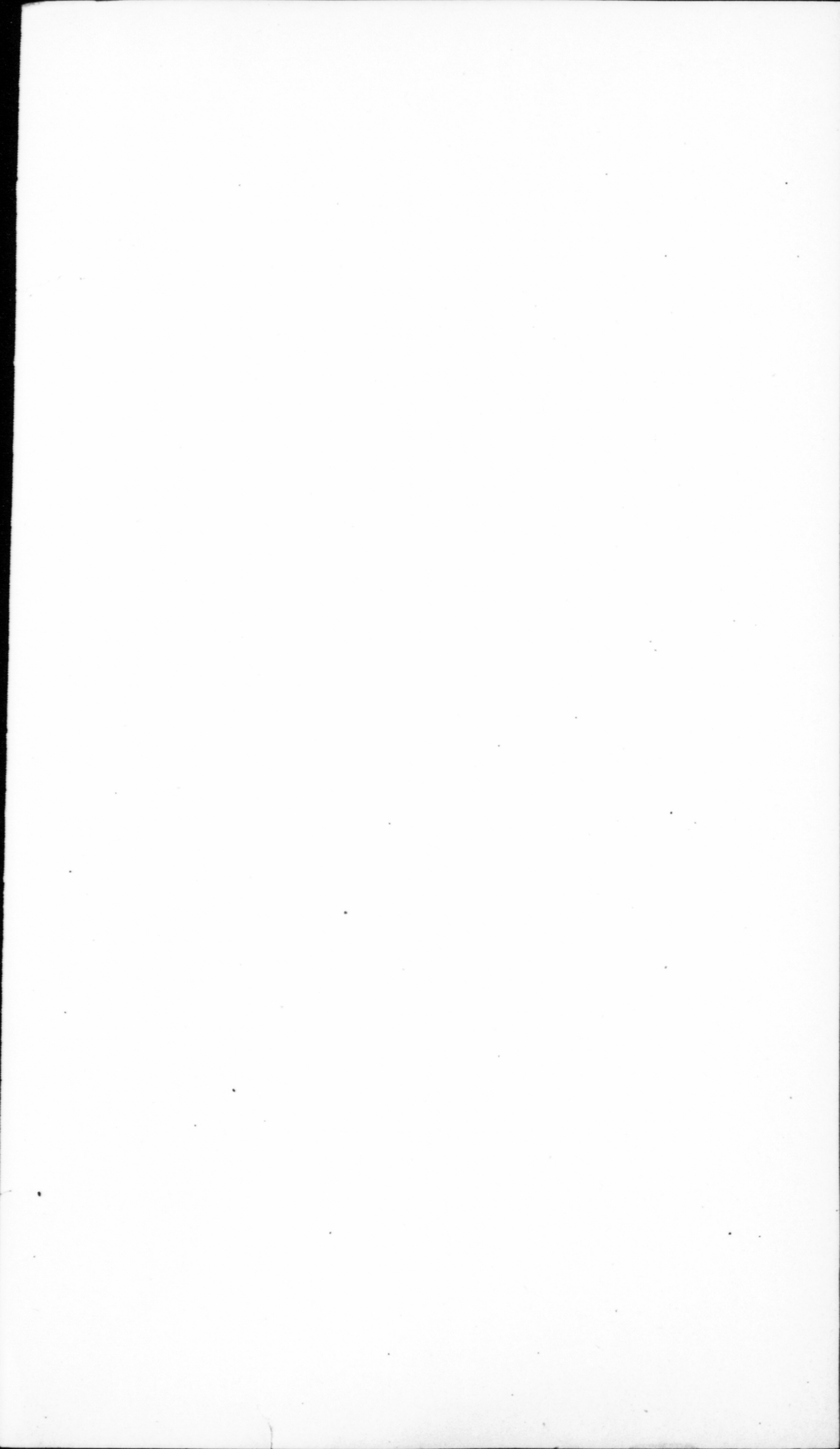
PERCY METZGER, APPELLANT,

vs.

**WILLIAM KELLY, WILLIAM C. WOODWARD, AND
SNOWDEN ASHFORD, BOARD FOR THE CONDEMNATION
OF INSANITARY BUILDINGS IN THE DISTRICT
OF COLUMBIA.**

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED OCTOBER 18, 1909.



COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1909.

No. 2079.

PERCY METZGER, APPELLANT,

vs.

WILLIAM KELLY, WILLIAM C. WOODWARD, AND
SNOWDEN ASHFORD, BOARD FOR THE CONDEMNATION
OF INSANITARY BUILDINGS IN THE DISTRICT
OF COLUMBIA, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

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In the Court of Appeals of the District of Columbia.

No. 2079.

PERCY METZGER, Appellant,
vs.
WILLIAM KELLY et al., &c.

a Supreme Court of the District of Columbia.

United States District Court. No. 802.

PERCY METZGER, Petitioner,
vs.
WM. KELLY, WILLIAM C. WOODWARD, SNOWDEN ASHFORD, Board
for the Condemnation of Insanitary Buildings in the District of
Columbia, Respondents.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of
Columbia, at the City of Washington, in said District, at the times
hereinafter mentioned, the following papers were filed and proceed-
ings had in the above entitled cause, to wit:

1 *Petition, &c.*

Filed January 14, 1909.

In the Supreme Court of the District of Columbia, Holding a
District Court.

United States District Court. No. 802.

PERCY METZGER, Petitioner,
vs.
WM. KELLY, WILLIAM C. WOODWARD, SNOWDEN ASHFORD, Board
for the Condemnation of Insanitary Buildings in the District of
Columbia, Respondents.

To the Honorable Supreme Court of the District of Columbia, hold-
ing a District Court of the United States for said District:

The petition of Percy Metzger respectfully shows to the Court as
follows:

1. That petitioner is a citizen of the United States, a resident of the District of Columbia and presents this petition in his own right.

2. That Wm. Kelly, William C. Woodward and Snowden Ashford, are citizens of the United States, residents of the District of Columbia, and constitute the board for the condemnation of insanitary buildings in the District of Columbia.

3. That petitioner is the owner of sub lots numbered 42, 43, and 44, in Square numbered 557 of this district improved by houses numbered and known as 165, 167, and 169 Pierce Street North West, Washington, D. C.

4. That heretofore, to wit; on the Eighteenth (18th) day of November A. D. 1908, said board for the condemnation of insanitary buildings, caused a notice to be served on the petitioner whereby and wherein said notice, an order was made and signed by a majority of said board, condemning the premises hereinbefore mentioned, and further ordering that "unless said buildings be changed or repaired," "said buildings should be demolished and removed," a copy of said order being hereto attached and marked Exhibit "A," and made a part of this petition.

5. Petitioner states that by reason of the building regulations existing and in force in this District at the present time, petitioner is unable to resist the carrying out of the order of Condemnation herein shown, or to make the repairs necessary to avoid the order passed by said board.

6. Petitioner says that the carrying out of the order as herein recited, has already brought considerable loss to the petitioner by reason of the cutting off of rentals received by petitioner, and that the demolition and removal of said buildings will bring to petitioner a large loss of revenue from said houses as they now stand, to wit; the yearly sum of five hundred and one dollars and sixty cents, (\$501.60) the sum petitioner has regularly received from said houses and premises for a number of years past, and until this order was issued.

7. Petitioner says that under the law creating the board as aforesaid and described and known as an Act to create a board for the condemnation of insanitary buildings in the District of Columbia and for other purposes, approved May first 1906 under section numbered fourteen this Court may appoint a board of award to receive and hear evidence respecting the loss or damage which may arise by reason of the condemnation to owners property, in order that owners of such condemned property may have the benefit of such damages as said board of award (when appointed) may find has resulted from such condemnation, petitioner therefore prays this Honorable Court to name and appoint such board or committee of award, and your petitioner prays as follows:

Prayers.

1. That the subpoena of this Honorable Court may issue to said board for the condemnation of insanitary buildings in the District of Columbia requiring the said board to answer the exigencies of this petition.

2. That the Committee of Award provided for under section fourteen (14) of the act creating said board, be named and appointed and instructed as to their duties, by this Honorable Court.

3. For such other and further relief as the exigencies of the case require and this Court has power to grant.

PERCY METZGER, *Petitioner*.

The Respondents to this petition are William Kelly, Dr. William C. Woodward and Snowden Ashford, the board for the condemnation of insanitary buildings.

4

Verification.

I do solemnly swear that I have read the petition by me subscribed and know the contents thereof, and that the facts therein stated upon my personal knowledge are true, and those stated upon information and belief, I believe to be true.

PERCY METZGER, *Petitioner*.

Subscribed and sworn to before me this 14th day of January, A. D. 1909.

J. R. YOUNG, *Cl'k*,
By F. E. CUNNINGHAM, *Ass't Cl'k*.

5

EXHIBIT "A."

Office of the Board for the Condemnation of Insanitary Buildings,
District of Columbia.

File No. 624.

IN THE MATTER OF THE CONDEMNATION OF PREMISES SITUATED
on Lots 42, 43, 44, Square 557, and Known as Nos. 165, 167,
169 Pierce St. N. W.

Order of Condemnation.

1
1

WASHINGTON, D. C., Oct. 31st, 1908.

Percy Metzger, Esq., 472 La. Ave. N. W.

SIR: The premises described above having been found, as the result of an investigation by the Board for the Condemnation of Insanitary Buildings, to be in such insanitary condition as to endanger the health or the lives of the occupants thereof, or of persons living in the vicinity; and the owners of said buildings having been notified in the manner prescribed by law to show cause why such buildings should not be condemned, and no cause having been shown, within the time allowed by law and prescribed in said notice, sufficient in the opinion of a majority of the members of said board to prevent condemnation of said building:

It is hereby ordered, This 29th day of October, 1908, that said building be, and it is hereby, condemned.

6 And it is further ordered that unless said building be so changed or repaired as to remedy the conditions which led to the condemnation thereof, the owner of said building demolish and remove the same within 60 days after the service of this notice.

W. KELLY,
Ass't to Engineer Commissioner, D. C.,
 S. ASHFORD,
Inspector of Buildings,
Board for the Condemnation of Insanitary Buildings.

NOTE.—It is unlawful for any person to occupy a condemned building after thirty days, exclusive of Sundays and legal holidays, after a copy of the order of condemnation has been affixed to said building.

It is unlawful for any person having authority to prevent to permit any such building to be occupied, except as specially authorized by the Board for the Condemnation of Insanitary Buildings, after thirty days, exclusive of Sundays and legal holidays, from and after the date of the service of a copy of the order of condemnation on the owner of such building; or, if there be several part owners of such building, from the latest date of service on any part owner; or, if a copy or copies of such order of condemnation has been affixed to the condemned building at a date subsequent to the date of service of the notice on any owner or the latest date of service on any part owner, after thirty days from the date on which said copy or copies of such order of condemnation was so affixed.

Notice served on Mr. Metzger this 18 day of Nov., 1908.

ROY E. HAYNES, *Inspector.*

Demurrer.

Filed February 11, 1909.

In the Supreme Court of the District of Columbia, Holding a District Court.

No. 802. District Court.

PERCY METZGER, Petitioner,

vs.

WILLIAM KELLY et al., Board of Condemnation of Insanitary Buildings, Respondents.

Now come the respondents and say that the petition filed in the above entitled cause is bad in substance.

E. H. THOMAS,
 W. H. W.,
Corporation Counsel, Attorney for Respondents.

NOTE.—Among the matters assigned as cause for demurrer are:

1. The petition does not allege facts sufficient to give the court jurisdiction.

2. The petition does not show with sufficient certainty what relief is desired nor does it ask for any relief grantable under the law.

3. The allegations of the petition are vague, indefinite and insufficient.

4. The petition is insufficient as matter of law.

8

Memorandum.

February 26, 1909.—Demurrer withdrawn by leave of Court.

Amended Petition.

Filed March 10, 1909.

In the Supreme Court of the District of Columbia, Holding a District Court.

United States District Court. No. 802.

PERCY METZGER, Petitioner,

VS.

WILLIAM KELLY, WILLIAM C. WOODWARD, SNOWDEN ASHFORD,
Board for the Condemnation of Insanitary Buildings in the District of Columbia, Respondents.

To the Honorable Supreme Court of the District of Columbia, holding a District Court of the United States for said District:

The Amended Petition of Percy Metzger, by leave of the Court to so amend, having been first had and obtained. Respectfully shows to the Court as follows:

9 1. That petitioner is a citizen of the United States, a resident of the District of Columbia, and presents this amended petition in his own right.

2. That William Kelly, William C. Woodward and Snowden Ashford are citizens of the United States, residents of the District of Columbia, and constitute the Board for the Condemnation of Insanitary Buildings in the District of Columbia.

3. That petitioner is the owner of sub lots numbered 42, 43, and 44, in square numbered 557 of this District, improved by houses numbered and known as 165, 167 and 169 Pierce street, North West, Washington, D. C.

4. That heretofore to wit: on the eighteenth (18th) day of November A. D. 1908, said Board for the Condemnation of Insanitary Buildings, caused a notice to be served on the petitioner, whereby and wherein said notice, an order was made and signed by a majority of said Board, condemning the premises hereinbefore mentioned, and further ordering, that "Unless said buildings be changed or re-

paired," "said buildings should be demolished and removed." A copy of said order being attached to the original petition filed herein, and marked "Exhibit A" which said copy is hereby referred to and made a part of this petition.

5. Petitioner states that by reason of the building regulations existing and in force in this District at the present time, petitioner is unable to resist the carrying out of the order of Condemnation herein shown, or to make the repairs necessary to avoid the order passed by said Board.

6. Petitioner says that the carrying out of the order as
10 herein recited, has already brought considerable loss to the petitioner by reason of the cutting off of rentals received by petitioner. And that the demolition and removal of said buildings will bring to petitioner a large loss of revenue from said houses, as they now stand, to wit: the yearly sum of four hundred and eighty-nine dollars and sixty cents (\$489.60), the sum petitioner has regularly received from said houses and premises for a number of years past, and until this order was issued. And petitioner asks damages incurred by loss of rentals from his houses, in the sum of fourteen hundred and sixty-eight dollars and eighty cents (\$1468.80).

7. Petitioner says, that said houses can be placed in a good state of repair for the sum of four hundred and fifty dollars (\$450.) and that when so repaired their value would be the sum of one thousand and five hundred dollars (\$1500.). Petitioner therefore says that the demolition of said houses will cause him a further loss in the sum of one thousand and fifty dollars (\$1050.), this being the value of said houses if so repaired, less the sum required to place them in a good state of repair.

8. Petitioner says that under the law creating the Board as aforesaid, and described and known as an Act to Create a Board for the Condemnation of Insanitary Buildings in the District of Columbia and for other purposes, approved May 1, 1906, under section numbered fourteen, this Court may appoint a Board of Award to receive and hear evidence respecting the loss or damage which may arise by reason of the condemnation to owners' property, in order that
owners of such condemned property may have the benefit of
11 such damages as said Committee of Award (when appointed) may find has resulted from such condemnation proceedings.

9. Petitioner therefore claims damages in the sum of twenty-five hundred and eighteen dollars and eighty cents (\$2518.80), the loss incurred by him, by reason of the Condemnation proceedings herein.

Premises considered petitioner prays as follows:

Prayers.

First. That the subpoena of this Honorable Court may issue to said Board for the Condemnation of Insanitary Buildings in the District of Columbia, requiring said Board to answer the exigencies of this petition.

Second. That the Committee of Award provided for under section fourteen of the Act creating said Board be named and appointed and instructed as to their duties by this Honorable Court.

Third. That petitioner may have judgment of this Court against the defendants hereto in the sum of two thousand, five hundred and eighteen dollars and eighty cents (\$2518.80), the total sum claimed by reason of the loss of rentals from houses, together with the loss of his houses.

Fourth. For such other and further relief as the exigencies of the case require and this Court may have power to grant.

PERCY METZGER, *Petitioner.*

The respondents to this petition are: William Kelly, Dr. William C. Woodward, Snowden Ashford, the Board for the Condemnation of Insanitary Buildings.

12

Verification.

I do solemnly swear that I have read the petition by me subscribed and know the contents thereof, and that the facts therein stated upon my personal knowledge are true and those stated upon information and belief, I believe to be true.

PERCY METZGER, *Petitioner.*

Subscribed and sworn to before me this 10th day of M^{ch} A. D. 1909.

J. R. YOUNG, *Clerk,*
By F. E. CUNNINGHAM,
Assistant Clerk.

Demurrer to Amended Petition.

Filed March 25, 1909.

In the Supreme Court of the District of Columbia, Holding a District Court.

No. 802. District Court.

PERCY METZGER, *Petitioner,*

vs.

WILLIAM KELLY et al., Board of Condemnation of Insanitary Buildings, *Defendants.*

13 Now come the respondents and say that the amended petition filed in the above entitled cause is bad in substance.

E. H. THOMAS,
W. H. W.,
Attorney for Respondents.

NOTE.—Among the matters assigned as cause for demurrer are:

1. The amended petition does not allege facts sufficient to give the court jurisdiction.

2. The amended petition does not show with sufficient certainty what relief is desired, nor does it ask for any relief grantable under the law.

3. The allegations of the amended petition are vague, indefinite and insufficient.

4. The amended petition is insufficient as matter of law.

Memorandum.

April 16, 1909.—Demurrer to amended petition sustained.

14 *Order Extending Time for Filing Second Amended Petition.*

Filed April 28, 1909.

In the Supreme Court of the District of Columbia, Holding a
District Court.

District Court. No. 802.

METZGER

vs.

KELLY et al.

Upon consideration of the motion of the plaintiff herein it is this 28th day of April, 1909, ordered that the time for filing the second amended petition be and the same hereby is extended for the period of ten days from this date.

THOS. H. ANDERSON, *Justice.*

Second Amended Petition.

Filed May 10, 1909.

In the Supreme Court of the District of Columbia, Holding a
District Court.

United States District Court. No. 802.

PERCY METZGER, Petitioner,

vs.

WILLIAM KELLY, WILLIAM C. WOODWARD, SNOWDEN ASHFORD,
Board for the Condemnation of Insanitary Buildings in the Dis-
trict of Columbia, Respondents.

15 To the Honorable Supreme Court of the District of Columbia,
holding a District Court of the United States for said Dis-
trict:

The Second Amended Petition of Percy Metzger, leave of the
Court to so amend, first having been had and obtained. Respectfully
shows to the Court as follows:

1. That the Petitioner is a citizen of the United States, a resident of the District of Columbia, and presents this Second Amended Petition in his own right.

2. That William Kelly, William C. Woodward and Snowden Ashford are citizens of the United States, residents of the District of Columbia, and constitute the Board for the Condemnation of Insanitary Buildings in the District of Columbia.

3. That the petitioner is the owner of sub lots numbered 42, 43, and 44, in square numbered 557 of this District, improved by houses numbered and known as 165, 167 and 169 Pierce street, Northwest, Washington, D. C.

4. That heretofore to wit: on the eighteenth (18th) day of November A. D. 1908, said Board for the Condemnation of Insanitary Buildings, caused a notice to be served on the petitioner whereby and wherein said notice, an order was made and signed by a majority of said Board, condemning the premises hereinbefore mentioned, because of their insanitary condition, and further ordering, that "Unless said buildings be changed or repaired," "said buildings should be demolished and removed." A copy of said order being attached to the original Petition filed herein, and marked "Exhibit

A" which said copy is hereby referred to and made a part of
16 this petition.

5. Petitioner states that by reason of the building regulations existing and in force in this District at the present time, petitioner is unable to resist the carrying out of the order of Condemnation herein shown, or to make the repairs necessary to avoid the order passed by said Board, although petitioner states that at the time of the passage of this said order of the Board for the Condemnation of Insanitary Buildings, his said buildings were in a reasonably good state of repair and were not in an insanitary condition. Petitioner further states that the said order of the Board requiring his said buildings to be demolished and removed is arbitrary, unjust and not warranted by the condition of said buildings, and that unless this said order is subjected to the review and determination of a court of competent jurisdiction, petitioner will have been thereby deprived of his property without due process of law.

6. Petitioner says that under the law creating the Board as aforesaid, and described and known as an Act to Create a Board for the Condemnation of Insanitary Buildings in the District of Columbia and for other purposes, approved May 1, 1909, this court is vested with jurisdiction to modify or vacate any order for the demolition of a building made by said Board as aforesaid.

7. Petitioner further states that in all such cases where this court shall refuse to modify or vacate such orders of the said Board, it is further vested with jurisdiction to appoint a committee of Award to receive and hear evidence respecting the loss and damage
17 which may accrue to the owner of property by reason of the destruction of his property by an order of said Board.

8. Petitioner says that the carrying out of the order as herein recited, has already brought considerable loss to the petitioner by reason of the cutting off of rentals received by petitioner. And that

the demolition and removal of said buildings will bring to the petitioner a large loss of revenue from said houses, as they now stand, to wit: the yearly sum of four hundred and eighty-nine dollars and sixty cents (\$489.60) the sum petitioner has regularly received from said houses and premises for a number of years past, and until this order was issued, and posted on his houses by said Board. Petitioner therefore says that if the said order of the said Board be carried into effect and his said property demolished, he will suffer damage by reason of loss of their rental in the sum of \$1468.80.

9. Petitioner says, that said houses can be placed in a good state of repair for the sum of four hundred and fifty dollars (\$450.00) and that when so repaired their value would be the sum of one thousand and five hundred dollars (\$1500.00). Petitioner therefore says that the demolition of said houses will cause him a further loss in the sum of one thousand and fifty dollars (\$1050.00), this being the value of said houses if so repaired, less the sum required to place them in a good state of repair.

Premises considered petitioner prays as follows:

Prayers.

18 *First.* That the subpoena of this Honorable Court may issue to said Board for the Condemnation of Insanitary Buildings in the District of Columbia, requiring said Board to answer the exigencies of this petition.

Second. That the Court will vacate and set aside the order of the said Board for the Demolition of Insanitary Buildings hereinbefore set forth; or will so modify said order as to protect the property of petitioner and preserve his rights and interests therein.

Third. That should the Court decline to vacate or modify said order, that the Court will then appoint a Committee of Award to determine the damages accruing to petitioner by reason of the demolition of his said buildings under the order of said Board; and that the Court will render judgment in his favor for the amount of damages assessed in his favor by such Committee of Award.

Fourth. For such other and further relief as the exigencies of the case require and this Court may have power to grant.

PERCY METZGER, *Petitioner.*

VICTOR H. WALLACE, *Att'y.*

The respondents to this petition are: William Kelly, Dr. William C. Woodward, Snowden Ashford, the Board for the Condemnation of Insanitary Buildings.

Verification.

19 I do solemnly swear that I have read the petition by me subscribed and know the contents thereof, and that the facts therein stated upon my personal knowledge are true and those stated upon information and belief, I believe to be true.

PERCY METZGER, *Petitioner.*

Subscribed and sworn to before me this 10th day of May A. D. 1909.

J. R. YOUNG, *Clerk*,
By F. E. CUNNINGHAM,
Assistant Clerk.

Demurrer to Second Amended Petition.

Filed June 3, 1909.

In the Supreme Court of the District of Columbia, Holding a
District Court.

District Court. No. 802.

PERCY METZGER

VS.

WILLIAM KELLY et al., Board for the Condemnation of Insanitary
Buildings in the District of Columbia.

Now come the respondents and say that the amended petition, filed herein, is bad in substance, because—

1. *This* “second amended petition” is the first “proceeding” instituted by petitioner “for the modification or vacation of the
20 order of condemnation” and was not instituted or filed “within the time specified in the order of condemnation,” namely, sixty days from November 18, 1908.

2. Paragraphs eight and nine of the second amended petition are substantially the same as paragraphs six and seven of the amended petition, a demurrer to which amended petition the court heretofore sustained.

3. The second amended petition does not allege facts sufficient to give the Court jurisdiction.

4. The second amended petition does not show with sufficient certainty what relief is desired nor does it ask for any relief grantable under the law.

5. The allegations of the second amended petition are vague, indefinite and insufficient.

6. The second amended petition is insufficient as matter of law.

E. H. THOMAS,

W. H. W.,

Corporation Counsel, Attorney for Respondents.

Mr. Percy Metzger:

Please take notice that the foregoing demurrer has been duly calendared for hearing and will be called up before the Justice hearing District Court Cases on Friday June 11th, 1909, at 10 o'clock A. M. or as soon thereafter as counsel can be heard.

E. H. THOMAS,

G.,

Att'y for Respondents.

21 *Order Sustaining Demurrer to Second Amended Petition.*

Filed August 27, 1909.

In the Supreme Court of the District of Columbia, Holding a
District Court.

District Court. No. 802.

PERCY METZGER.

vs.

WILLIAM KELLY et al.

This cause coming on to be heard on demurrer to the second amended petition filed herein, and after argument by counsel and being considered by the court, it is, by the court, this 27th day of August, A. D. 1909, adjudged, ordered and decreed that the said demurrer be and the same is hereby sustained.

By the Court,

THOS. H. ANDERSON, *Justice.*

From the foregoing decree, the Complainant, in open Court, notes an appeal to the Court of Appeals of the District of Columbia, and the bond for costs is hereby fixed in the sum of one hundred \$100.00 dollars.

THOS. H. ANDERSON, *Justice.*

22 *Bond for Appeal to Court of Appeals.*

Filed September 1, 1909.

In the Supreme Court of the District of Columbia.

District Court. No. 802.

PERCY METZGER, Petitioner,

vs.

WILLIAM KELLY, WILLIAM C. WOODWARD, and SNOWDEN ASH-
ford, Board for the Condemnation of Insanitary Buildings, Re-
spondents.

Know all men by these presents, That we, Percy Metzger, as principal, and Isaac G. Thorne, as surety, are held and firmly bound unto the above named respondents in the full sum of One hundred dollars to be paid to the said Respondents their executors, administrators, successors, or assigns. To which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, administrators, successors, and assigns, firmly by these presents. Sealed with our seals, and dated this — day of —, in the year of our Lord one thousand Nine hundred and Nine.

Whereas the above-named Percy Metzger has prosecuted an appeal to the Court of Appeals of the District of Columbia, to reverse the Decree rendered in the above suit by the said Supreme Court of the District of Columbia:

23 Now, therefore, the condition of this obligation is such, That if the above-named Percy Metzger shall prosecute his said appeal to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

PERCY METZGER. [SEAL.]
ISAAC G. THORNE. [SEAL.]

Sealed and delivered in presence of—
———

Approved the 1st day of September, 1909.

THOS. H. ANDERSON,
Justice, S. C. D. C.

Directions to Clerk for Preparation of Transcript of Record.

Filed September 27, 1909.

District Court. No. 802.

PERCY METZGER, Petitioner,
vs.

WILLIAM KELLY, WILLIAM C. WOODWARD, SNOWDEN ASHFORD,
Board for the Condemnation of Insanitary Buildings.

The Clerk of the Court will please have a transcript of this case prepared for appeal to the Court of Appeals for the District of Columbia, as follows:

1909. .

June 14. Petition, appearance, order Jurat & Exhibit.
“ 27. Appearance of E. H. Thomas for def'd'ts.

24

Feb'y 11. Demurrer of Respondents.
“ 26. “ “ “ “ allowed withdrawn.

M'ch 10. Amended petition & Jurat.
25. Demurrer to “

Apr. 16. “ sustained & leave to file Amended petition.
28. Time extended 10 days to file Am'd petition.

May 10. 2d Amended petition & Jurat.

June 3. Demurrer to 2d Amended petition.

August 27. Demurrer sustained, & appeal in open Court.

Sept. 1. Appeal Bond, appearance of Victor H. Wallace for petitioner.

V. H. WALLACE &
PERCY METZGER,
Attorneys for Petitioner.

25 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

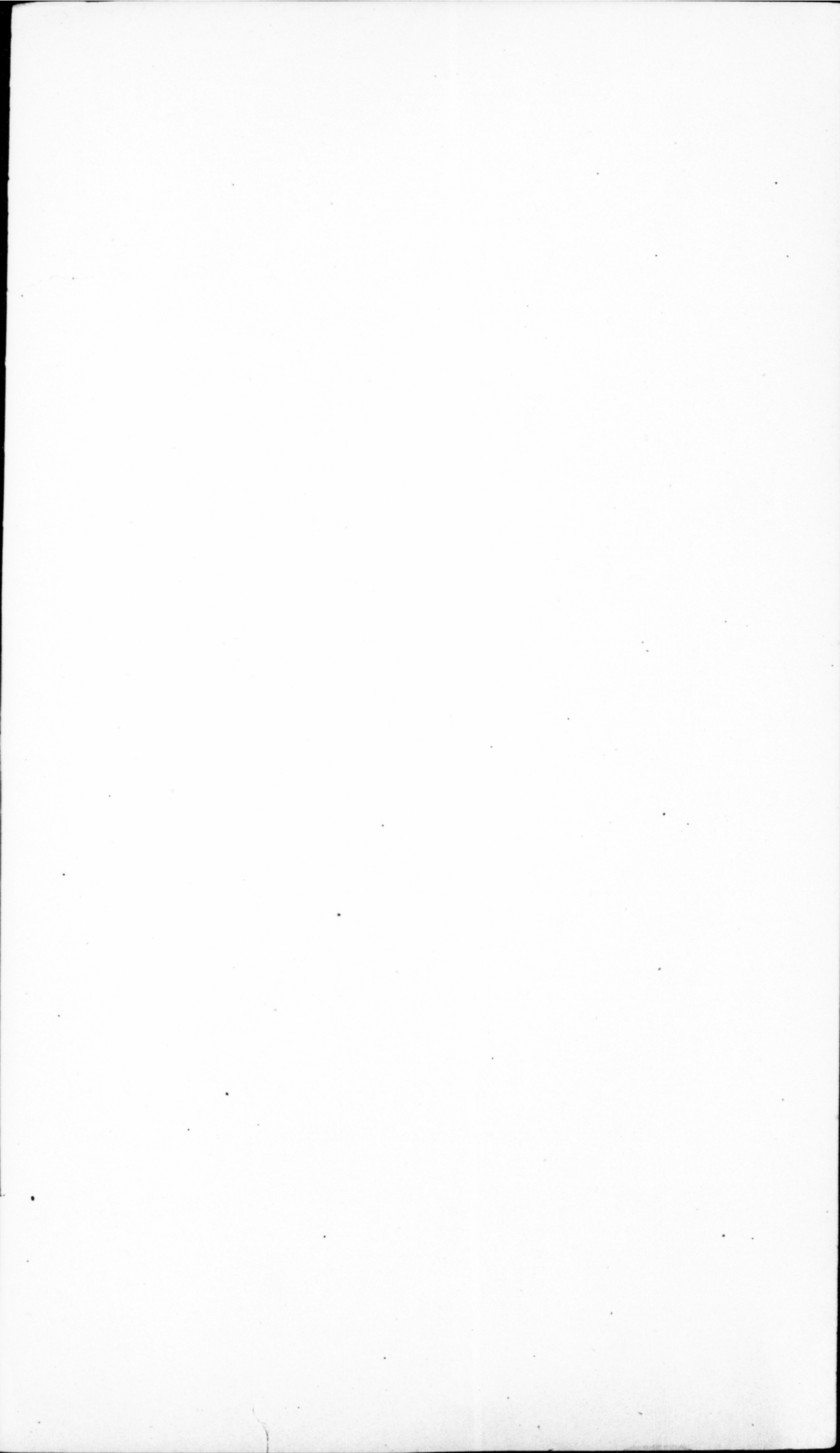
I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 24, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 802, District Court, wherein Percy Metzger is Petitioner and William Kelly, et als. are Respondents, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 16th day of October A. D. 1909.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2079. Percy Metzger, appellant, vs. William Kelly et al., &c. Court of Appeals, District of Columbia. Filed Oct. 18, 1909. Henry W. Hodges, clerk.



COURT OF APPEALS,
DISTRICT OF COLUMBIA

FILED
FEB 8 - 1910

IN THE

Henry W. Hodges
vs.

Court of Appeals, District of Columbia.

JANUARY TERM, 1910.

No. 2079.

PERCY METZGER, APPELLANT,

vs.

WILLIAM KELLY, WILLIAM C. WOODWARD, AND
SNOWDEN ASHFORD, BOARD FOR THE CONDEMNATION
OF INSANITARY BUILDINGS IN THE DISTRICT OF
COLUMBIA.

BRIEF FOR APPELLEES.

EDWARD H. THOMAS,

WILLIAM HENRY WHITE,

Attorneys for Appellees.

IN THE
Court of Appeals, District of Columbia.

JANUARY TERM, 1910.

No. 2079.

PERCY METZGER, APPELLANT,

vs.

WILLIAM KELLY, WILLIAM C. WOODWARD, AND
SNOWDEN ASHFORD, BOARD FOR THE CONDEMNATION
OF INSANITARY BUILDINGS IN THE DISTRICT OF
COLUMBIA.

BRIEF FOR APPELLEES.

The act of Congress approved May 1, 1906, creates the Board for the Condemnation of Insanitary Buildings in the District of Columbia, and directs that it shall consist of the assistant to the Engineer Commissioner in charge of buildings.

Section 3 of the act directs the board—

“to investigate * * * into the sanitary condition of any building or part of a building in said District. * * * If any building or part of a building

be found, as the result of such investigation, to be in such insanitary condition as to endanger the health or the lives of the occupants thereof or of persons living in the vicinity, said board shall cause a notice to be served on each owner or part owner of such building, requiring him to show cause within not less than twenty days, exclusive of Sundays and legal holidays, from the date of the service of said notice, why such building or part of building should not be condemned. And if, within the time specified in said notice no cause be shown, sufficient in the opinion of a majority of said board to prevent the condemnation of such building or part of building said board shall issue an order condemning such building or part of building, and shall cause a copy of such order to be served on each owner or part owner, thereof, and a copy or copies to be affixed to the building or part of building condemned."

In this case the investigation, finding, notice, and failure to show cause are all in the following order of condemnation:

"The premises described above having been found, as the result of an investigation by the Board for the Condemnation of Insanitary Buildings, to be in such insanitary condition as to endanger the health or the lives of the occupants thereof, or of persons living in the vicinity; and the owners of said building having been notified in the manner prescribed by law to show cause why such building should not be condemned, and no cause having been shown, within the time allowed by law and prescribed in said notice, sufficient in the opinion of a majority of the members of said board to prevent condemnation of said building: It is hereby ordered, this 29th day of October, 1908, that said building be, and it is hereby, condemned.

"And it is further ordered that unless said building be so changed or repaired as to remedy the conditions which led to the condemnation thereof, the

owner of said building demolish and remove the same within 60 days after the service of this notice."

This was served on appellant November 18, 1908 (Rec., 5). Appellant next says, "that by reason of the building regulations existing and in force in this District at the present time petitioner is unable to resist the carrying out of the order of condemnation herein shown or to make the repairs necessary to avoid the order passed by said board."

This condition is provided for by section 7 of the act, which is:

"That the owner or owners of any building or buildings condemned under the provisions of this act, which cannot be so changed or repaired as to remedy the condition which led to the condemnation thereof, shall demolish and remove such building or part of building within a time to be specified by said board in the order of condemnation. And if any owner or part owner shall fail or refuse to demolish and remove said building or part of building within the time so specified he shall be deemed guilty of a misdemeanor and liable to the penalties provided by section thirteen of this act, and such building or part of building shall be demolished and removed under the direction of the Board for the Condemnation of Insanitary Buildings in the District of Columbia, and the cost of such demolition and removal, less the amount, if any, received from the sale of the old material, but including the cost of making good such damage to adjoining premises as may have resulted from carelessness or willful recklessness in the demolition of such building and the cost of publication, if any, herein provided for, shall be assessed by the Commissioners of the District of Columbia as a tax against the premises on which such building or part of building was situated, such tax to be collected in the same manner as general taxes are collected, and when collected shall be deposited in the Treasury to the credit of the United States and the District of Columbia in equal parts."

The building regulations "have the same force and effect within the District of Columbia as if enacted by Congress."

Act of June 14, 1878.

United States *ex rel.* Strasburger *vs.* Commissioners,
5 Mackey, 393.

Under the original and first amended petition petitioner does not deny nor does he object to the findings that his buildings were "insanitary;" he admits they may not be repaired lawfully, and the act of 1906 requires that they "shall be demolished and removed."

The original petition asking nothing specific, it was abandoned and the first amended petition was substituted. Under it two demands are made: first, *three years' rent* in advance for said buildings, which may not be allowed because section 5 makes it unlawful to occupy the buildings, and no such relief is authorized by the act or by law; and, second, for the value of the buildings as repaired, less the cost of repair, when it is unlawful to repair. Appellant here tried to bring his case within paragraphs "second" and "(b)" of section 14, which read:

"Second. That the building is in a state of defective sanitation, or is not in reasonably good repair;—

"(b) Shall in the second case be the amount estimated as the value of the building if it had been put into a sanitary or safe condition, or into reasonably good repair, after deducting the estimated expense of putting it into such condition or repair."

Admitting, however, as he does in his petition, that his buildings may not lawfully be repaired, his case fails under those paragraphs, and falls exactly within paragraphs "third" and "(c)," which are:

"Third. That the building is unfit and not reasonably capable of being made fit for human habita-

tion; and if the committee, or a majority of the members thereof is satisfied by such evidence that compensation should be awarded, then the compensation—

“(c) Shall in the third case be the value of the materials of the building.”

Under section 7 he is also chargeable with the cost of removal. The demurrer was properly sustained, as he did not ask for any relief to which he is entitled.

The second amended petition differs from the first in the following allegation only:

“At the time of the passage of this said order of the Board for the Condemnation of Insanitary Buildings, his said buildings were in a reasonably good state of repair and were not in an insanitary condition. Petitioner further states that the said order of the board requiring his said buildings to be demolished is arbitrary, unjust and not warranted by the condition of said buildings, and that unless this said order is subjected to the review and determination of a court of competent jurisdiction, petitioner will have been thereby deprived of his property without due process of law.”

Appellant thus made, for the first time, any objection to the order of the board in finding that his buildings are insanitary and in condemning them, and so asks, for the first time, for any grantable relief. Relief is authorized under section 14 of the act upon the reasonable condition, however:

“That the owner or owners of any building condemned under the provisions of this act may, within the time specified in the order of condemnation proceedings,” &c.

The “time specified in the order” expired before the filing of the second amended petition, before any grantable relief

was asked, and before any objection to the finding or condemnation was made.

Two possible constructions of section 14 are: First, that the court has jurisdiction only in "proceedings * * * for the modification or revocation of the order of condemnation," and the argument is that by the language of the act the "proceedings" are thus defined and limited; second, that "the court may appoint a committee of award, * * * who * * * shall proceed to hear and receive evidence respecting the amount of damages to the owner or owners of such condemned building" when there have been no proceedings instituted to modify or vacate the condemnation.

Under the first construction the court is without jurisdiction, as no such proceeding was instituted within the sixty days, and under the second there is the same want of jurisdiction, and the further objection that appellant is not entitled to any of the damages he asks.

The "committee of award" has no province except to fix damages within the limitations of the act, and may not pass upon the question of modification or vacation of the order of condemnation in any case. That is for the court. The court is without jurisdiction in this case, and the order finding the condition of the buildings and the order condemning them is final, and their status is fixed.

The court is without jurisdiction to appoint the committee of award for the same reason, and if appointed it could not make the award asked for. The demurrer to the second amended petition was also properly sustained.

Respectfully submitted,

EDWARD H. THOMAS,
WILLIAM HENRY WHITE,
Attorneys for Appellees.

FILED
JAN 27 1910

*Henry W. Hodges,
Clerk.*

IN THE
Court of Appeals in the District of Columbia
OCTOBER TERM, 1909

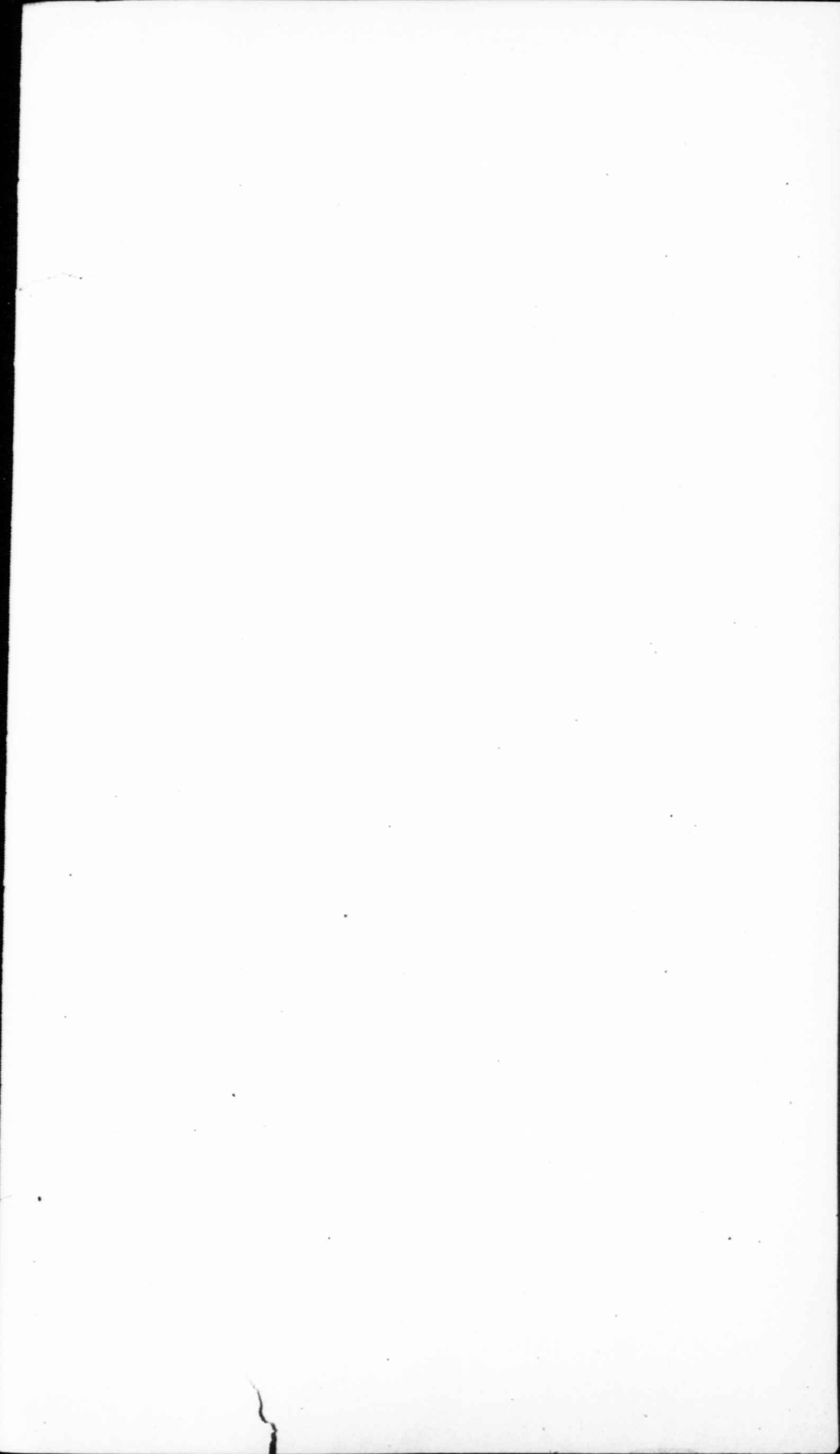
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No. 2079
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PERCY METZGER, *Appellant*

vs.

**WILLIAM KELLY, WILLIAM C. WOODWARD AND
SNOWDEN ASHFORD, *Board for the Condem-
nation of Insanitary Buildings in the
District of Columbia, Appellees.***

—
VICTOR H. WALLACE,
Attorney for Appellant.



IN THE
COURT OF APPEALS IN THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1909.

No. 2079.

PERCY METZGER, *Appellant*,

vs.

WILLIAM KELLY, WILLIAM C. WOODWARD AND SNOWDEN
ASHFORD, *Board for the Condemnation of Insanitary
Buildings in the District of Columbia,
Appellees.*

This is an appeal from an order of the District Court of the Supreme Court of the District of Columbia, sustaining the appellees' demurrer to the appellant's second amended petition.

STATEMENT OF THE CASE.

On the 31st day of October, 1908, the appellant, Percy Metzger, was the owner of lots 42, 43 and 44, Square 557, improved by houses known as Nos. 165, 167 and 169 Pierce Street N. W., Washington, D. C.

On that day the appellees, who constitute the Board for the Condemnation of Insanitary Buildings in the District of Columbia, purporting to act under authority vested in them by the Act of Congress of May 1st, 1906, issued an order condemn-

ing these said houses. This order is printed at page 3 *et seq* of the record. Notice of this order was served upon the appellant on November 18, 1908. On January 14, 1909, within the sixty days allowed by the said act for that purpose, the appellant filed his petition in the District Court of the Supreme Court of the District of Columbia, seeking the benefit of the provisions of Sec. 14, of the said act of May 1st, 1906. See record, page 1 *et seq*.

A demurrer was filed to this petition (Record 4) on behalf of the appellees, but subsequently and at the suggestion of the Court the demurrer was withdrawn by leave of Court; and the appellant, on March 10, 1909, filed an amended petition (Record 5), in which the allegations of the first petition were amplified. A second demurrer was filed to this amended petition (Record 7), and on hearing was sustained, but leave given to file a second amended petition (Record 8). On May 10, 1909, appellant filed his second amended petition (Record 8), in which he further amplified the allegations of his two preceding petitions. To this second amended petition a demurrer was likewise filed (Record 11), and was subsequently sustained by the Court (Record 12). At the time this decree of Court, sustaining this demurrer to this second amended petition was rendered, the appellant then and there, in open court, noted an appeal from that decree to this Court (Record 12).

ASSIGNMENTS OF ERROR.

The court erred:

1. In sustaining the demurrer to the second amended petition, and in holding that said petition does not allege facts sufficient to give the Court jurisdiction.
2. In sustaining said demurrer, and in holding that said petition does not show with sufficient certainty what relief is desired by the appellant, and that its allegations are vague, indefinite and insufficient.

3. In sustaining said demurrer, and in holding that said petition does not ask for relief grantable under the Act of May 1, 1906.

4. In sustaining said demurrer, and in holding that this said second amended petition is the first proceeding instituted by petitioner for the modification or vacation of the order of condemnation complained of, and that this said proceeding was not instituted or filed within the time specified in the order of condemnation, to wit: 60 days from the 18th day of November, 1908.

ARGUMENT.

I.

Counsel is informed that the present is the first proceeding instituted under Sec. 14, of the Act of May 1, 1906, which has ever been brought to a hearing. It follows that neither this Court nor counsel have the benefit of precedent, and this case must be considered as one of first impression, and decided in accordance with a reasonable construction of that statute.

There is no provision in the act as to what facts shall be set forth in a petition in order to give the Court jurisdiction. The facts set forth in the present petition under consideration are: the names and interests of the petitioner and the respondents; the petitioner's ownership of the property effected by the order of the respondents; the fact of the condemnation of this property by the respondents, and their alleged reasons for so doing; the fact that such condemnation is arbitrary, and not warranted by the condition of the property, which is in a reasonably good state of repair; the facts relating to the jurisdiction of the court; the amount of loss which petitioner has already suffered by reason of the order of condemnation, and a statement of the additional loss which will accrue to him if the order of condemnation is carried into effect.

To this is added a prayer for subpoena; a second prayer that the Court will vacate and set aside the order of condemnation, and in default of that relief, a third prayer asks that the committee of award provided for in the act may be appointed; and a fourth prayer prays for general relief.

We submit that such a statement of facts and such allegations as are set forth in this petition are sufficient to give the trial Court jurisdiction under any reasonable construction of the statute.

II AND III.

An inspection of the record itself is the only way to ascertain whether or not the allegations of the petition are vague and indefinite, we respectfully submit, however, that they are not, but that all the facts of the case are alleged with sufficient certainty.

As to the charge of the demurrer, sustained by the Court, to the effect that the petition under consideration does not show with sufficient certainty what relief is desired, and that it does not ask for any relief grantable under the law, appellant calls the attention of the Court to the language of the statute itself; especially Section 14.

The "relief grantable" under this law, is two fold. First the Court may set aside or modify the order of condemnation, if it does not appear that there is sufficient proof of the necessity of the destruction of the condemned buildings. Second, in default of such action by the court, a committee of award is to be appointed by the Court to determine the compensation, if any, the owner of the condemned property shall receive for its destruction.

This two fold relief is exactly what is prayed for by the prayers of the petition. The second prayer being for the vacation or modification of the order of condemnation, and the third prayer being for the appointment of the committee of award.

It is submitted that the prayers of the petition are both certain in their terms, and that both of them ask for relief grantable under the law.

IV.

The charge in the demurrer that the second amended petition is the first proceeding instituted by petitioner for the modification or vacation of the order of condemnation, and that it was not instituted or filed within the time specified in the order of condemnation, namely sixty days from November 18, 1908, rests upon this state of facts:

Neither the original petition, nor the first amended petition contain a specific prayer for the vacation or modification of the order of the Board of Condemnation. Both these petitions, however, after setting out the facts of the case in full, and plainly stating to the Court that it is the object of the petitioner to gain the benefits of Sec. 14, of the Act of May 1, 1906, concludes with a prayer for general relief.

In the second amended petition a specific prayer was added asking for the vacation or modification of the order of the Board of Condemnation. This, the appellees allege, changed the nature of the proceeding, and embodied in the petition a new ground of action, which they claim could not be done after more than sixty days from the notice of condemnation.

Appellant replies by saying that it is very plain to any one reading the first petition and the first amended petition, that it was his intention to claim the benefit of the 14th Section of the Act of May 1, 1906, and that any failure to specifically pray for the vacation or modification of the order of condemnation, if a fault at all, did not involve any matter of substance, but only involved a question of formal pleading. It is submitted, however, that when considered in any light, the general prayer appended to the petition was sufficient to entitle

him to any and all relief grantable by the Court under the act in question.

It is further respectfully submitted, however, that to permit an irresponsible and uncontrolled body of men, such as the Board for the Condemnation of Insanitary Buildings, to rule merely out of their own good pleasure, and upon their own judgment, that the property of appellant shall be destroyed, without insuring to him every opportunity to have his day in court as to the propriety of their order, would be a gross violation of his constitutional rights, and would deprive him of his property without due process of law. Appellant further says that any attempt to limit him in the exercise of his constitutional right to have the action of this Board reviewed by a Court of competent jurisdiction to a period of sixty days after service of notice of the finding of the Board upon him, is unreasonable, illegal and a violation of his constitutional rights.

V.

In conclusion appellant says that this case simply amounts to this. For a number of years he has been the owner of certain houses in this District, which have paid him a substantial revenue in rentals, and upon which the District of Columbia has regularly levied and collected taxes. By collecting these taxes the District has recognized that these houses have a value, and the rentals collected from them by the appellant have demonstrated that this value was very substantial.

On October 31st, 1908, the Board for the Condemnation of Insanitary Buildings, for reasons best known to themselves, decided that these buildings must be torn down. Surely appellant is entitled to have this decision reviewed and passed upon by some tribunal competent to determine from testimony to be adduced, whether or not this order of the Board is warranted by the facts, and if so warranted, whether or not the appellant

shall receive any compensation, and if so how much. We respectfully say that this right should be very freely given him, and should not be denied because of useless and meaningless technicalities, when his petition shows clearly upon what facts it is based, and what relief is desired.

Respectfully submitted that the decree of the lower court should be reversed.

PERCY METZGER.

VICTOR H. WALLACE,
Attorney for Appellant.